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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

18 CR 530 (LGS)

5 NAZEER VICKERS,

6 Defendant.

7 -----x

8 New York, N.Y.
9 October 16, 2018
5:10 p.m.

10 Before:

11 HON. LORNA G. SCHOFIELD,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

16 United States Attorney for the
Southern District of New York

17 ELINOR TARLOW

Assistant United States Attorney

18 FEDERAL DEFENDERS OF NEW YORK

Attorneys for Defendant

19 BY: SABRINA SHROFF

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(Case called)

MS. TARLOW: Good evening, your Honor, Elinor Tarlow for the government.

THE COURT: Good evening.

MS. SHROFF: Good evening, your Honor, on behalf of Mr. Vickers, Federal Defenders of New York by Sabrina Shroff. I am standing up for counsel of record, Mr. Flood, who is currently on trial before Judge Cote.

THE COURT: All right. Thank you very much. Thanks for being here, and you may be seated everyone.

I apologize for the lateness of the hour. Obviously we have been involved in some other things.

So I have the government's letter, which is dated October 11, I have the proposed protective order, but I don't have the defense position.

Before we get there, I think what I would like is a report from Ms. Tarlow, if you're able. I have not looked at the indictment, but I have read the letter, so I understand the charges insofar as they're described in the letter. Is there anything else that you would like to tell me about the charges or the information in that document?

MS. TARLOW: Your Honor, only to reiterate that the defendant is charged in three counts, conspiring to commit sex trafficking with others who not named in the indictment, and so the investigation is still ongoing, and two additional counts

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1 of sex trafficking of minors by force, fraud and coercion.

2 THE COURT: And how many victims are we talking about?

3 MS. TARLOW: In the indictment there are two victims
4 that are anonymized, but there are additional victims who we
5 have not charged in the indictment who we believe the defendant
6 also trafficked.

7 THE COURT: So in terms of the documents and victims
8 that are referenced in the documents and in the letter, are we
9 talking about two people or more than two people?

10 MS. TARLOW: As of now we know of at least three
11 individuals that were trafficked by the defendant. There may
12 be more of them.

13 THE COURT: Okay, thank you.

14 So Ms. Shroff, I have read the government's letter. I
15 don't believe I have anything from you. I am not even sure
16 what it is you want that is different from what the government
17 has proposed, so why don't you tell me what and why.

18 MS. SHROFF: Thank you, your Honor. I will try to be
19 brief because I note the lateness of the hour and you're on
20 trial. I did ask the government in this particular instance to
21 meet and confer in greater depth, but they declined.

22 Ms. Bracewell told me that she had an engagement to get to.
23 And I had asked her to give me the letter ahead of time, which
24 she also declined to do, I'm not really sure why.

25 Really I would like to keep it brief and tell the

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1 Court, please, that the strictures are such that it's
2 impossible, especially for an institutional defender, to
3 proceed with such a protective order. I also ask the Court to
4 consider that the protective order amendments that I sought
5 were amendments that other judges have granted. Judge Berman
6 granted it in *United States v. Rahami*, R-A-H-A-M-I, and Judge
7 Sullivan in *United States v. Burgess*, 18 CR 373, also told the
8 government that the strictures were too harsh.

9 THE COURT: Where are those proposed changes?

10 MS. SHROFF: If I could just ask the Court to take a
11 look at the letter itself.

12 THE COURT: I am.

13 MS. SHROFF: Thank you. So on page 2 there are three
14 categories, so the certain material -- the first category will
15 be designated as sensitive disclosure material.

16 THE COURT: Right, that can be revealed only in the
17 presence of counsel.

18 MS. SHROFF: Right. So I do not know the volume of
19 that material, but can you imagine if every single case that we
20 had --

21 THE COURT: Well, wait, wait. The description of
22 materials that will be designated as sensitive is described as
23 advertisements for commercial sex activities that contain
24 sexually suggestive photographs of identified victims and
25 unidentified females. And what they are proposing is that

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1 these materials not be released into the defendant's custody or
2 be viewed without supervision.

3 So that, frankly, seems reasonable to me. Why is that
4 not reasonable?

5 MS. SHROFF: Because, your Honor, I don't know the
6 volume of them. That means each time Mr. Vickers wants to
7 review his discovery somebody from my office has to literally
8 go to MCC, sit down, and review it with him.

9 THE COURT: But in light of the fact that he is in
10 custody, turning over to him any volume of what may be viewed
11 by other inmates as pornography into the MCC or MDC, I don't
12 understand how we can do that.

13 MS. SHROFF: It's done all the time at MCC. This is
14 certainly not the first sex trafficking case that the MCC has
15 seen, and whatever the pictures are, if the government
16 considers it so inflammatory, I suggested a compromise. I
17 suggested that they put all of the discovery in a Redweld, in a
18 folder, that it be given to the legal department and be held at
19 the library, that Mr. Vickers be able to access those documents
20 only while he is given the time to review his discovery and the
21 discovery be taken back.

22 It's no different than any other discovery. If the
23 government feels that these advertisements, which, by the way,
24 your Honor, are still up, they are still public, and anybody
25 and everybody can see them. If they are that concerned that

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1 they are inflammatory in the MCC, the compromise is fair.

2 I'm not asking them to let Mr. Vickers take them to
3 his cell. I will contact legal, legal will allow him time on
4 three or in the library to view the material and take the
5 material back. That's what the educational department at MCC
6 is for. Mr. Voltini is charge of it, and that's how the review
7 can continue.

8 In the alternative, I suggested to the government that
9 they redact whatever they consider inflammatory so that
10 Mr. Vickers can work with some part of the discovery. They
11 declined to do that as well. But I'm not really sure why the
12 compromise I have suggested is so outrageous.

13 THE COURT: First you have all, has any other judge --
14 who you can point to in something I can read -- accepted this
15 as a compromise on that particular position?

16 MS. SHROFF: I don't really know. I don't know if
17 anyone else has ever sought to preclude a defendant from
18 reviewing his discovery unless for --

19 THE COURT: Well, we're talking about a particular
20 part of that discovery.

21 MS. SHROFF: Right. I do know, for example, in *United*
22 *States v. Rahami*, which was a terrorism case, the concern was
23 that videotapes or sermons or literature about the greatness of
24 Al Qaeda or the Islamic State, the government did not want that
25 floating around in the MCC, and the compromise was that it

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1 would be put in the law library and the defendants could go to
2 the law library and review the material there. I'm not sure
3 how well the stricture worked, but that was the stricture that
4 was put into place.

5 THE COURT: Let me hear from the government. First
6 let me ask, was there a meet and confer on this or no?

7 MS. TARLOW: So your Honor, I did not participate in
8 the phone call that Ms. Bracewell participated in. There were
9 several phone conversations that I'm aware of, including two
10 phone conversations that I had with Mr. Flood. At the time
11 that Mr. Flood and I spoke he had a very limited concern about
12 the proposed protective order which he just said he needed
13 additional time to consider, and then Ms. Shroff entered an
14 appearance and additional concerns were raised.

15 THE COURT: All right. So do you want to address
16 Ms. Shroff's last argument?

17 MS. TARLOW: Yes, your Honor. I can't speak to the
18 two cases that Ms. Shroff raised. This is the first I'm
19 hearing of them and I have not had time to review them. I will
20 note that in three other cases the same substantive protective
21 order was entered against seven different defendants.

22 THE COURT: Over objection or no?

23 MS. TARLOW: There was one objection in a Judge Keenan
24 case, and the order was entered over defense counsel's
25 objection.

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1 THE COURT: All right.

2 MS. TARLOW: With respect to the substance of defense
3 counsel's argument, the advertisements, to my knowledge, some
4 of them may still be public, but some of them were posted on
5 the website of Backpage.com, which has since been shut down.

6 We also have significant concerns with the defendant
7 being able to even access and review these advertisements in
8 the law library, exposing the victims to further victimization
9 by being able to review them for an extended period of time,
10 perhaps have others review them in the library. As we noted in
11 our letter, these are victims who not only were minors at the
12 time that they were trafficked and were taken photographs of,
13 but they were also minors who witnessed incredible violence by
14 the defendant and so are especially vulnerable.

15 MS. SHROFF: But we have offered --

16 THE COURT: I will take that under advisement. Let's
17 talk about the other category.

18 MS. SHROFF: Your Honor, we have offered to have them
19 redact the photographs. We have offered that to them. We
20 don't need the photographs.

21 THE COURT: So the documents that contain the
22 photographs are what exactly?

23 MS. TARLOW: Your Honor, they are advertisements for
24 commercial sex services that were posted on websites, and they
25 include photographs that are sexually explicit, some of the

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1 women are barely clothed, and various other descriptions of
2 women's names and other identifying information.

3 THE COURT: Okay.

4 MS. SHROFF: So I participated in the conference call
5 with Ms. Bracewell, I gave her the names of the cases, and I
6 offered that they redact the names, and we stand by that. All
7 the identifying information about the victims, Mr. Vickers
8 doesn't need to see it. He does not need to see the
9 photographs.

10 THE COURT: Let me ask this, if you could email me
11 with a copy to the defendant five exemplars that would fall
12 into this category of what would be designated as sensitive,
13 that way I will have an idea if we're talking about mostly
14 pictures, mostly words, any words besides names or what. So if
15 you could try to make them representative, I would appreciate
16 is that.

17 MS. TARLOW: Yes, your Honor. And that would be on
18 the condition that they wouldn't be shared with the defendant?

19 THE COURT: Yes. Ms. Shroff, please understand that
20 they're not to be shared with anyone except counsel for
21 purposes of my deciding on the motion.

22 MS. SHROFF: Of course, your Honor.

23 THE COURT: All right. Then there's another category
24 of materials which are sensitive -- sorry, these were materials
25 that could be reviewed in the presence of counsel, then there

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1 are certain materials that could not be reviewed even in the
2 presence of counsel, they're essentially attorney's eyes only,
3 and we're talking about -- I mean I see a description, but I
4 don't fully understand what we're talking about. Phone
5 extractions and social media returns.

6 So what are we talking about? Chats?

7 MS. TARLOW: Your Honor, we have complete phone
8 extractions of at least one woman who we believe that the
9 defendant trafficked, and we may have additional phone
10 extractions of other victims.

11 THE COURT: So you mean the entire contents of her
12 phone?

13 MS. TARLOW: Yes, your Honor.

14 THE COURT: Well, it's conceivable that there are
15 things in her phone -- and I know that you have a system for
16 the defense to overcome this constraint, but it's possible that
17 there are things on the phone that aren't necessarily highly
18 sensitive that could be very relevant to the defense. So what
19 do you plan to do about that?

20 MS. TARLOW: Yes, your Honor, that is in part why we
21 are turning over the phone in its entirety so that we are not
22 having to make that initial threshold determination of what may
23 or may not be relevant, and defense counsel, after reviewing
24 the phone, can ask the government to --

25 THE COURT: Unredact or change the designation for

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1 particular parts of it.

2 MS. TARLOW: Yes, your Honor.

3 THE COURT: And the entire phone sounds like it's a
4 huge volume, so I don't want to put an unreasonable burden on
5 the defense. What are we talking about in terms of volume?

6 MS. TARLOW: Your Honor, I don't know the exact
7 kilobytes, but it is someone's phone, and so it has text
8 messages and emails, some social media content associated with
9 it.

10 THE COURT: Okay. Ms. Shroff?

11 MS. SHROFF: Your Honor, how am I supposed to work
12 with discovery that I can't show Mr. Vickers in the first
13 instance?

14 And also in the second instance, look, I understand, I
15 understand the government's concerns, so that's why we offered
16 up all these redactions. But Mr. Vickers is going to go to
17 trial. We are going to have to unredact all of this
18 information.

19 THE COURT: Well, some of it may be completely
20 irrelevant.

21 MS. SHROFF: But it's very unfair for the government
22 to give me a phone dump and say you deal with it.

23 THE COURT: So here's a question: The real question
24 is who has the burden of reviewing this material to figure out
25 what really needs to be protected in some way, and how do we

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1 deal with that?

2 MS. SHROFF: Look, I'm happy to split it. I don't
3 mind. They want to give me a phone dump, they can take half
4 the dump and I will take the other half. I'm happy to split
5 it. I really am. I have really gone out of my way to try and
6 figure out a way that I did not have to involve the Court in
7 this. I'm perfectly happy to do a 50/50 split, or I'm
8 perfectly happy to have them do the first cut and give me the
9 unredacted version and see if I could live with their
10 redactions. Either way is fine with me.

11 But I do not think that the government can have a
12 protective order that basically says -- they refuse to
13 undertake any review. Even in *Rahami*, which was a case where
14 there was scores of terrorism-related material, Judge Berman
15 ordered the government to undertake a review every three months
16 to see if these very strict confines needed to remain.

17 I mean I don't know --

18 THE COURT: I will stop you right there.

19 Ms. Tarlow, 50/50 sounds pretty reasonable.

20 MS. TARLOW: May I make one final point?

21 THE COURT: Yes.

22 MS. TARLOW: Which is that the government fully
23 intends to identify fully relevant data for defense counsel and
24 make that identified data available.

25 THE COURT: Under other circumstances?

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1 MS. TARLOW: Your Honor, we intend to review it as
2 relevant data, and to the extent we don't think that the
3 victim's privacy is implicated, then we would turn that over
4 unredacted or in some redacted version.

5 THE COURT: Let me make sure I understand. You
6 intend -- the whole idea is to get the whole phone to them so
7 that we don't hold things up, but in the meantime you intend to
8 identify relevant data and produce it to them separately,
9 either unredacted or with some kind of designation on it
10 pursuant to confidentiality agreement, is that right?

11 MS. TARLOW: That is correct, your Honor.

12 THE COURT: And when would that be done?

13 MS. TARLOW: We are reviewing many victim phones right
14 now in this case and other cases that are similar, so I
15 hesitate to give your Honor a definite timeline.

16 THE COURT: So why don't you give me a proposal on
17 that, send it at the same time that you send your exemplars.
18 Actually you should probably put that in a letter and file the
19 letter, that way everybody has it and it's filed, and then I
20 will rule at that point. Okay?

21 MS. TARLOW: Yes, your Honor.

22 THE COURT: Thank you.

23 MS. TARLOW: Your Honor, one point of clarification,
24 should we file the exemplars under seal?

25 THE COURT: I think you should file the exemplars

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1 under seal, send me a courtesy copy by email to my chambers and
2 email Ms. Shroff at the same time, if that's okay.

3 MS. TARLOW: Yes, your Honor.

4 THE COURT: Okay. And I'm wondering if we want to be
5 making digital copies, expanding the universe of digital copies
6 of victims' photos. If you would rather give me hard copies
7 and give Ms. Shroff hard copies, that's fine, too.

8 MS. TARLOW: Thank you, your Honor. When would your
9 Honor --

10 THE COURT: How soon can you do it? Because I don't
11 want to hold things up.

12 MS. TARLOW: Would Monday be acceptable?

13 THE COURT: That's fine. So Monday for both for the
14 letter with your proposal as far as disclosure of phone data,
15 and then Monday also for the photos.

16 MS. TARLOW: Yes, your Honor.

17 THE COURT: Okay. Anything else?

18 MS. SHROFF: Not from us, your Honor.

19 THE COURT: We're adjourned. Thank you.

20 MS. TARLOW: Thank you, your Honor.

21 (Adjourned)
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23
24
25